No. 84-74

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM R. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's inadvertent instruction suggesting that proof of monetary loss to the government was not required under 18 U.S.C. 641 constituted plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 734 F.2d 296.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1984. The petition for a writ of certiorari was filed on July 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on three counts of embezzlement, in violation of 18 U.S.C. 641, and one count of filing a false statement, in violation of 18 U.S.C. 1001. Petitioner was sentenced to concurrent terms of ten years' imprisonment on the embezzlement

counts and five years' imprisonment on the false statement count. The court of appeals affirmed (Pet. App. 1-18).

The evidence at trial showed that petitioner was authorized to act as a closing attorney and escrow agent in connection with loans made by the Farmers Home Administration (FmHA), an agency of the federal government. Petitioner embezzled almost $65,000 in FmHA loan proceeds that he was obligated to apply to the borrowers' outstanding debts, including in some cases prior FmHA loans. When questioned by the FmHA about the disposition of the proceeds of one of the loans, petitioner responded that he had sent the agency a check for the balance of the funds, and later stated that he would soon send the agency a check. No such check, however, was ever received from petitioner. The loan proceeds were deposited in petitioner's trust account, and some of the funds were traced to personal expenditures, including the purchase of a tavern. Pet. App. 3-5.

The court charged the jury that "whether or not the government was deceived or suffered monetary loss because of the acts charged in the indictment is immaterial" (Pet. App. 8). This instruction was submitted by the government as part of its proposed instructions concerning the false statement offense. See Appellee's C.A. Br. 22-23. The court, however, apparently inadvertently shifted the order of the instructions and read the quoted statement immediately after its embezzlement instructions but before the portion of the charge concerning the false statement count. Accordingly, as the government conceded in the court of appeals, it was not entirely clear to which offense the instruction applied. Pet. App. 9; Appellee's C.A. Br. 23. Petitioner did not object to the instruction as given.

The court of appeals affirmed, concluding that proof of loss to the government is not an essential element of embezzlement under 18 U.S.C. 641 (Pet. App. 8-16). The court

noted that "[p]roof of the victim's property loss has consistently been held to be unnecessary to prove embezzlement" and reasoned that this rule is "consistent with the purpose of § 641 which is to provide a sanction for intentional conduct by which a person either misappropriates or obtains a wrongful advantage from government property" (Pet. App. 13, 15). The court declined to follow the statement in *United States* v. *Collins*, 464 F.2d 1163, 1165 (9th Cir. 1972), that proof of loss to the government is essential, concluding that "there was no explanation for the court's promulgation" of this requirement and that "the cases cited as authority for the proposition do not support it" (Pet. App. 11).

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred in concluding that monetary loss to the United States is not an essential element of embezzlement under 18 U.S.C. 641 and that its decision is in conflict with those of other courts of appeals.[1] Although we believe that the Seventh Circuit's resolution of this question is correct, there is no need to address the alleged intercircuit conflict in this case. The issue arose from an inadvertent error in the order of the instructions, which was never objected to by petitioner; the

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[1]Petitioner's related claim (Pet. 8-9) that the instruction in question negated the requirement that *federal* funds be embezzled is plainly without merit. The district court referred in its instructions at least three times to the requirement that the government prove that petitioner had embezzled money "of the United States" (Tr. 228-230). Moreover, petitioner told the jury in closing argument that the victim in this case was the United States and not the individuals involved in the loans (*id.* at 204-205; see also *id.* at 210, 211). Petitioner does not contend that the evidence failed to establish the federal character of the embezzled funds (see note 3, *infra*), and the court's instructions and his own closing argument plainly focused the jury's attention on this issue. Accordingly, there is no realistic possibility that "[t]he jury may have decided that the borrowers were the parties who were deprived of their funds, and that the only loss suffered was by them" (Pet. 9).

remainder of the instructions made clear that conversion is a necessary element of embezzlement under Section 641; and the evidence that the government suffered a property loss in this case is overwhelming. In any event, the alleged conflict results simply from one circuit's dictum, and does not represent a substantial disagreement over the interpretation of Section 641.

1. As we have noted (page 2, *supra*), the instruction in question was shifted from its intended place among the other false statement instructions to a place between the embezzlement and false statement instructions. Not only was the instruction wholly proper with respect to the Section 1001 false statement offense,[2] it signified by its reference to whether the government was "deceived" that it related to that count and not to the embezzlement counts. Had petitioner objected, the district court could have clarified that the instruction applied only to the Section 1001 count. As this Court has observed, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) (footnote omitted); see also *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982); Fed. R. Crim. P. 30, 52(b).

This is not that "rare case." Even accepting petitioner's construction of Section 641, the charge to the jury did not constitute plain error. Petitioner seizes upon a single misplaced sentence, ignoring the balance of the charge, which fully set forth the elements of the offense. The court instructed the jury (Tr. 230) that to " 'embezzle' means wilfully to take or convert to one's own use another's money

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[2]See, *e.g.*, *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941); Pet. App. 8; 2 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 28.07 (3d ed. 1977). See also *United States* v. *Yermian*, No. 83-346 (June 27, 1984).

or property" and that "to 'convert' money or property to one's own use means to apply or appropriate or use such money or property for the benefit or profit of the wrongdoer." Reading the charge as a whole, it is clear that the jury was adequately instructed concerning any need for loss to the government by virtue of the instructions requiring that the government prove that its property was taken or converted by petitioner. See also note 1, *supra.*

Moreover, the evidence in this case that the government suffered an actual loss is overwhelming, and indeed not disputed by petitioner. The embezzled funds originated with the government, and petitioner was required to dispense them in accordance with the FmHA's instructions.[3] With respect to each of the loan transactions, petitioner was obligated to remit all or part of the funds he held in escrow to the FmHA, but failed to do so (see Pet. App. 3-5). In these circumstances, petitioner's claim of plain error must fail.

2. In any event, petitioner's claim of a conflict among the circuits on the question of whether proof of actual loss to the government is required under Section 641 does not withstand analysis. In *United States* v. *Collins, supra,* the court reversed a conviction not because the government failed to prove a loss, but because it failed to prove that the embezzled property actually belonged to the United States. The court reasoned that a stolen warrant, drawn by the City and County of San Francisco on an account containing federal funds, belonged to the City and County, not to the

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[3]The agency's instructions to petitioner concerning the proper use of the funds clearly constituted sufficient federal control to render the funds "money * * * of the United States" for purposes of Section 641, even though they had been paid to the borrowers (see Pet. App. 7-8). See, *e.g., United States* v. *Benefield,* 721 F.2d 128 (4th Cir. 1983); *United States* v. *McIntosh,* 655 F.2d 80, 83-84 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982).

United States. Because the government's money "in legal contemplation remain[ed] in its account," the court concluded that no property of the United States was ever taken by the defendant (464 F.2d at 1165):

> Even if we assume that the Government owned the money against which the warrant was drawn, the piece of paper Collins stole belonged to the City and the money [Collins obtained] to the bank; nothing he took belonged to the Government.

It was in this context that the court went on to state (*ibid.*) that "[i]t is an essential element of the crime of stealing Government property in violation of 18 U.S.C. § 641 that the Government have suffered an actual property loss." Interpreted with reference to the question before the court, then, the remark was simply a restatement, if an inartful one, of the court's conclusion that the government must have an interest in the embezzled property.[4] Interpreted as petitioner would suggest, the statement can only be regarded as dictum. Similarly, the other cases relied on by petitioner

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[4]This reading is reinforced by an examination of the cases relied on by the court, *United States* v. *Johnston*, 268 U.S. 220, 226-227 (1925), and *United States* v. *Alessio*, 439 F.2d 803 (1st Cir. 1971) (per curiam), both of which addressed the question whether the embezzled property was owned by the United States. See Pet. App. 10-11. Indeed, the First Circuit affirmed after its decision in *Alessio* that permanent loss to the victim is not an element of embezzlement. *United States* v. *Daley*, 454 F.2d 505, 509-510 (1972). Moreover, although the Ninth Circuit has continued to cite *Collins* for the proposition that actual loss is required (see, *e.g.*, *United States* v. *Long*, 706 F.2d 1044, 1048 (1983); *United States* v. *Gibbs*, 704 F.2d 464, 465 (1983) (per curiam)), neither that court nor any other court of appeals has ever reversed a conviction under Section 641 for failure to prove an actual loss to the government where the government had a sufficient interest in the embezzled property. Finally, the Ninth Circuit has, since *Collins*, suggested that loss to the victim of embezzlement is not essential. See *United States* v. *Tingle*, 658 F.2d 1332, 1337 (1981) ("[a]ll that is necessary * * * to commit a conversion * * * is that [the defendant] exercise dominion and control over the money inconsistent with the [true owner's] rights").

(Pet. 4-5) hold only that Section 641 requires proof of the government's interest in the embezzled property.[5]

It is well established that the victim of an embezzlement need not suffer an actual and permanent property loss.[6] Rather, embezzlement requires only "a serious act of interference with the owner's rights." W. LaFave & A. Scott, *Handbook on Criminal Law* § 89, at 645 (1972). As the

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[5]In *United States* v. *Evans*, 572 F.2d 455, 470-471 (5th Cir. 1978), the court cited *Collins* in the course of addressing the defendants' argument that "the government failed to prove that the [embezzled] funds were government property * * * [and] that the district court erroneously failed to submit this issue to the jury." The court explained (572 F.2d at 474 n.20) that

> [t]he *ratio decidendi* of the *Collins* majority was simply the principle that a bank which is induced to pay a check upon a forged endorsement loses its own money and not that of its depositor.

Similarly, in *United States* v. *Forcellati*, 610 F.2d 25, 30 (1st Cir. 1979), the question was whether the government retained a sufficient property interest in a Treasury check after it had been mailed to the payee; the court noted that in *Collins*, the warrant was the city's and not the federal government's, and cited the case only for the proposition that "the receipt of a check or warrant by a third person does not end the issuer's property interest in the instrument." See also *United States* v. *Gavin*, 535 F. Supp. 1345, 1348 (W.D. Mich. 1982) ("The dispositive issue is whether the Government has shown * * * a continuing federal interest in the funds"); *United States* v. *Edwards*, 473 F. Supp. 81, 81 (D. Mass. 1979) (defendant asserted that the embezzled check "was not the property of the United States"); *United States* v. *Farrell*, 418 F. Supp. 308, 310 (M.D. Penn. 1976) ("the government must establish a property interest in the [stolen goods]").

[6]See, *e.g.*, *United States* v. *Cauble*, 706 F.2d 1322, 1354 (5th Cir. 1983), cert. denied, No. 83-585 (Jan. 23, 1984); *Golden* v. *United States*, 318 F.2d 357, 361 (1st Cir. 1963); *United States* v. *Matsinger*, 191 F.2d 1014, 1018 (3d Cir. 1951); *Rakes* v. *United States*, 169 F.2d 739, 743 (4th Cir.), cert. denied, 335 U.S. 826 (1948); *Dobbins* v. *United States*, 157 F.2d 257, 259 (D.C. Cir. 1946); *Hancey* v. *United States*, 108 F.2d 835, 837 (10th Cir. 1940); *Weinhandler* v. *United States*, 20 F.2d 359, 362 (2d Cir.), cert. denied, 275 U.S. 554 (1927); see also *Commissioner* v. *Wilcox*, 327 U.S. 404, 408-409 (1946).

court below recognized (Pet. App. 11-16), there is nothing in the language, history, or policy of Section 641 that would require a different result under that statute. The most natural reading of *Collins* and the cases that cite it is in accord with this conclusion. Petitioner's reading would lead to the incongruous result that one could take property of the United States, even for an extended period, and escape prosecution simply by making restitution. This is not the law, nor should it be.[7] See, *e.g., Elmore* v. *United States,* 267 F.2d 595, 601 (4th Cir. 1959).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Even if this were the standard, petitioner could not meet it. At least one of the prior FmHA liens, in the amount of more than $30,000, that petitioner was obligated to satisfy out of the loan proceeds he received had not been repaid at the time of trial (Tr. 31, 164-165; see also Pet. App. 3-4).